

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DONALD WHITE, JR.,

Plaintiff,

v.

BRIAN EWERT,

Defendant.

NO: 4:16-cv-05122-MKD

REPORT AND RECOMMENDATION
TO DISMISS COMPLAINT

By Order filed October 28, 2016, the Court advised Plaintiff of the deficiencies of his complaint and directed him to amend or voluntarily dismiss within sixty (60) days. ECF No. 7. On December 28, 2016, the Court granted Plaintiff an additional thirty days in which to amend or voluntarily dismiss. ECF No. 9. Plaintiff has not complied with the Court's directive and has filed nothing further in this action.

In his complaint, Plaintiff alleged a single incident in which he was instructed to wait ten minutes to use the toilet, and then during an apparent

1 emergency security situation he was denied use of the restroom for an unspecified
2 period of time. Plaintiff alleged no resulting harm.

3 Plaintiff also alleged that he missed meals if he was on the toilet when his
4 cell was opened and closed for dinner. He did not state when this occurred, how
5 frequently this occurred, who denied him food, or the consequences of this alleged
6 deprivation. *See, e.g., Jaros v. Illinois Dept. of Correction*, 684 F.3d 667, 670-71
7 (7th Cir. 2012) (occasional missed meal that did not endanger the inmate did not
8 state a claim); *see also Hutto v. Finney*, 437 U.S. 678, 683, 686-87 (1978) (diet
9 consisting of fewer than 1,000 calories each day could violate Eighth Amendment
10 if maintained for substantial time period).

11 Furthermore, Plaintiff's allegation of a single incident when Defendant
12 Ewert opened Plaintiff's incoming legal mail in Plaintiff's presence and then
13 "looked at [him] with an intimidating stare" was insufficient to state a
14 constitutional violation. *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974).

15 **RECOMMENDED DISMISSAL**

16 Although granted the opportunity to do so, four months have passed and
17 Plaintiff has not filed an amended complaint stating a legally sufficient claim.
18 Therefore, for the reasons set forth above and in the Order to Amend or
19 Voluntarily Dismiss, ECF No. 7, **IT IS RECOMMENDED** that the Complaint,
20 ECF No. 6, be **DISMISSED with prejudice** for failure to state a claim upon

1 which relief may be granted under 28 U.S.C. §§ 1915(e)(2) and 1915A(b)(1), and
2 that such dismissal count as a “strike” under 28 U.S.C. § 1915(g).

3 **OBJECTIONS**

4 Any party may object to a magistrate judge's proposed findings,
5 recommendations or report within fourteen (14) days following service with a copy
6 thereof. Such party shall file written objections with the Clerk of the Court and
7 serve objections on all parties, specifically identifying the portions to which
8 objection is being made, and the basis therefor. Any response to the objection
9 shall be filed within fourteen (14) days after receipt of the objection. Attention is
10 directed to Fed. R. Civ. P. 6(e), which adds additional time after certain kinds of
11 service.

12 A district judge will make a de novo determination of those portions to
13 which objection is made and may accept, reject, or modify the magistrate judge's
14 determination. The judge need not conduct a new hearing or hear arguments and
15 may consider the magistrate judge's record and make an independent determination
16 thereon. The judge may, but is not required to, accept or consider additional
17 evidence, or may recommit the matter to the magistrate judge with instructions.
18 *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000); 28 U.S.C. §
19 636(b)(1)(B) and (C), Fed. R. Civ. P. 72; LMR 4, Local Rules for the Eastern
20 District of Washington.

1 A magistrate judge's recommendation cannot be appealed to a court of
2 appeals; only the district judge's order or judgment can be appealed.

3 **IT IS SO RECOMMENDED.** The Clerk of Court is directed to enter this
4 Report and Recommendation, forward a copy to Plaintiff at his last known address

5 DATED March 1, 2017.

6 s/ Mary K. Dimke
7 Mary K. Dimke
8 United States Magistrate Judge
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